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FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7004
DATE COMPLAINT FILED: 2/01/2016
DATE OF NOTIFICATION: 2/05/2016
LAST RESPONSE RECEIVED: 2/25/2016
DATE ACTIVATED: 11/25/2016

CELA

ELECTION CYCLE: 2016
EXPIRATION OF SOL: 8/12/2020 – 11/17/2020

COMPLAINANT:

Elihu Eli El

RESPONDENTS:

Stars and Stripes Forever PAC (f/k/a The 2016
Committee) and Robert H. Frank in his official
capacity as treasurer
John Philip Sousa IV
Ron Robinson

RELEVANT STATUTES:

52 U.S.C. § 30120(a)
52 U.S.C. § 30124(b)
11 C.F.R. § 110.11(a)-(c)
11 C.F.R. § 110.16(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that The 2016 Committee (n/k/a Stars and Stripes Forever PAC) and Robert H. Frank in his official capacity as treasurer (the "Committee"), an independent-expenditure-only political committee, and Committee officials John Philip Sousa IV and Ron Robinson, violated the Federal Election Campaign Act of 1971, as amended (the "Act") by:

(1) failing to disclose that they were not authorized by any candidate or candidate's committee;

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1 and (2) misrepresenting themselves as acting on behalf of a candidate or candidate's committee
2 for the purpose of soliciting contributions. The Committee and Sousa IV deny the allegations.¹

3 We recommend that the Commission dismiss the allegation that the Committee violated
4 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a). Although some communications were missing
5 disclaimers or included only partially adequate disclaimers, they were unlikely to mislead
6 recipients. The Committee made sufficient information available such that the recipients would
7 likely understand that the Committee paid for those communications and that it was not
8 authorized by a candidate or candidate's committee. We also recommend that the Commission
9 find no reason to believe that the Respondents violated 52 U.S.C. § 30124(b)(2) and 11 C.F.R.
10 § 110.16(b)(2), because the available information does not indicate that the Respondents
11 misrepresented themselves in the manner alleged.

12 II. FACTS

13 Stars and Stripes Forever PAC is an independent-expenditure-only political committee
14 that supported Dr. Ben Carson's candidacy for the 2016 Republican presidential nomination.²
15 Until recently, it operated under the name The 2016 Committee.³ It is affiliated with The 2016
16 Draft Committee, which began its existence as the National Draft Ben Carson for President
17 Committee, but changed its name after Carson become a candidate.⁴ At the relevant times, John
18 Philip Sousa IV was the Committee's National Chairman and Ron Robinson was its National
19 Digital Director.⁵

¹ Robinson did not respond in his individual capacity.

² See Committee & Sousa IV Resp. at 2-3 n.4 (Feb. 25, 2016).

³ Stars and Stripes Forever PAC, Amended Statement of Organization (Jan. 9, 2017).

⁴ *Id.*; see Committee & Sousa IV Resp. at 5; 52 U.S.C. § 30102(e)(4).

⁵ Committee & Sousa IV Resp. at 1 n.1; Compl., Ex. at 22 (Feb. 1, 2016).

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1 Complainant states that he made a \$100 contribution in the belief that he was donating to
2 Carson's presidential campaign, and speculates that "most donors" were similarly misled.⁶
3 Complainant alleges that the Respondents "have not adequately disclosed to potential donors that
4 they are acting as a political action committee" and "have used misleading publications and
5 advertisement[s] to misrepresent themselves as an official campaign fundraising entity [of
6 Carson's presidential campaign]."⁷

7 The allegations arise out of four documents attached to the Complaint.⁸

- 8 • *Screenshot of the Committee's Website.*⁹ The Complaint alleges that the Committee's
9 website "fools" viewers into believing that it is Carson's official campaign website.¹⁰
10 The webpage header states "Welcome to Win Ben Win – South Page," and there are two
11 logos with "Win Ben Win!" in large font and "The 2016 Committee" underneath in
12 smaller font. The page lists the titles and contact information of individuals who were
13 apparently part of the Committee's effort to organize in the South. Although the
14 screenshot supplied with the Complaint does not show the entire webpage, an archived
15 version includes a boxed disclaimer stating that the webpage was "Paid for by The 2016
16 Committee," and that it was "Not authorized by any candidate or candidate's
17 committee."¹¹ The Committee's street address, telephone number, and email address
18 were listed directly above that box. The Response confirms that such a disclaimer is
19 displayed on the website.¹²
20
21 • *August 12, 2015 Email.*¹³ The email, sent by Sousa IV, solicited contributions to
22 Committee and advocated for Carson's election. He signed the email as Chairman of The

⁶ Compl. at 1; see *id.*, Ex. at 13-15 (email from Complainant to individuals associated with the Committee in which Complainant offered recommendations he intended to be received by Carson and his official campaign).

⁷ Compl. at 1.

⁸ There are other attached documents besides the four highlighted in this Report. Those items, however, are relevant to an additional claim, unrelated to the Act, that Committee representatives "caused turmoil" at Complainant's workplace. *Id.*, Ex. at 25. This alleged activity is beyond the Commission's jurisdiction, and we make no recommendation with respect to it.

⁹ *Id.* at 10-12.

¹⁰ *Id.* at 9.

¹¹ THE 2016 COMMITTEE., <https://web.archive.org/web/20150811000851/http://www.2016committee.org/> (archived version from August 11, 2015).

¹² Committee & Sousa IV Resp. at 5.

¹³ Compl., Ex. at 2-5.

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1 2016 Committee. At the top was a banner consisting of Carson's image and a "Win Ben
2 Win!" logo, similar to the logos on the Committee's website, except that it also provided
3 the Committee's website URL. At the bottom was a boxed disclaimer which stated,
4 "Paid for by The 2016 Committee," "Not authorized by any candidate or candidate's
5 committee," and "Formerly the National Draft Ben Carson for President Committee."
6 The disclaimer did not include the Committee's address, telephone number, or website.
7

- 8 • *September 16, 2015 Email Receipt.*¹⁴ The automated email was sent by the Committee to
9 Complainant in acknowledgement of his \$100 contribution. The top portion is a message
10 from Sousa IV thanking Complainant for his contribution and describing how the
11 contribution will assist with efforts to elect Carson as president. Sousa IV signed as
12 "2016 Committee Chairman," and provided his phone number "to call me personally
13 should you have any questions." The middle portion, which was in a box to separate it
14 from the rest of the message, contained the Committee's name in larger print and
15 information relevant to the contribution, including Complainant's identifying information
16 and contribution amount. The bottom portion repeated the Committee's name and listed
17 its street address, but there was no statement regarding who paid for the email or whether
18 it was authorized by any candidate or candidate's committee.
19
- 20 • *November 16, 2015 Email.*¹⁵ Even though Sousa IV's name and the Committee's website
21 URL appeared in the "From" field, the email actually was sent by Carson's authorized
22 committee, Carson America, using the Committee's email list on a rental basis.¹⁶ At the
23 bottom, a boxed disclaimer stated, "Paid for by Carson America, Inc." A short preamble
24 from Sousa IV stated, "I'm forwarding you an urgent message from Ben Carson that I
25 thought would be of interest to you." Directly above the preamble text was the same
26 banner and logo as in the Committee's August 12, 2015, email. Below the preamble,
27 separated by a thin line, was an email written by Carson sandwiched between his
28 committee's logo and a large button to donate to his campaign.

29 The Respondents assert that the communications at issue contain adequate disclaimers
30 and "nothing in the [attached] documents . . . would reasonably support the notion that . . .
31 [Complainant's] subjective belief [about the Committee] was the result of fraudulent
32 misrepresentations."¹⁷ They claim that "[t]he very documents attached to the complaint reveal

¹⁴ *Id.* at 7-8.

¹⁵ Compl., Parts 1-3.

¹⁶ *Id.*, Part 1 ("John Philip Sousa IV (The 2016 Committee) <john@2016committee.org>"); Committee & Sousa IV Resp. at 3 n.5. The Response explains that the email "contain[ed] transmittal information from the list owners at the outset, in accordance with professional fundraising standards and the practices" to prevent the email from ending up in recipients' spam folders. Committee & Sousa IV Resp. at 3 n.5.

¹⁷ Committee & Sousa IV Resp. at 4.

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1 that The 2016 Committee complied with the FECA and FEC regulations.”¹⁸ Furthermore, as
2 mentioned above, the Respondents maintain that “[a]t all pertinent times” the website contained
3 an adequate disclaimer that “clearly and unambiguously disclosed” the Committee’s identity and
4 clearly described its independence from the candidate and his official campaign.¹⁹ Further, the
5 website described the Committee as “the successor to the National Draft Ben Carson for
6 President Committee,” and explained that the Committee removed Carson’s name from its title
7 pursuant to the Commission’s regulations.²⁰

8 III. LEGAL ANALYSIS

9 A. Disclaimers

10 Email of more than 500-substantially similar communications, when sent by a political
11 committee, and all Internet websites of a political committee that are available to the general
12 public, must include disclaimers.²¹ For communications not authorized by a candidate, the
13 candidate’s authorized committee, or an agent of either, the disclaimers shall clearly state: (1) the
14 name and permanent street address, telephone number, or website of the committee; and (2) that
15 the communication is not authorized by a candidate or candidate’s committee.²² Moreover, the
16 disclaimers “must be presented in a clear and conspicuous manner.”²³ “A disclaimer is not clear
17 and conspicuous if it is difficult to read . . . or if the placement is easily overlooked.”²⁴

¹⁸ *Id.*

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ 11 C.F.R. § 110.11(a)(1); *see* 52 U.S.C. § 30120(a).

²² 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3).

²³ 11 C.F.R. § 110.11(c)(1).

²⁴ *Id.*

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1 *Screenshot of the Committee's Website.* The website apparently included an adequate
2 disclaimer. It identified the Committee as the payor, stated that the website was not authorized
3 by any candidate or candidate's committee, and listed the Committee's street address, telephone
4 number, and email address. Moreover, the text of the disclaimer was conspicuous and easily
5 readable.

6 *August 12, 2015 Email.* This email included a disclaimer with most, but not all, of the
7 required information.²⁵ Importantly, the disclaimer identified the Committee as the payor and
8 stated that the email was not authorized by any candidate or candidate's committee, but it did not
9 list the Committee's street address, telephone number, or website. However, the URL of the
10 Committee's website was shown in a logo contained in the email, and the URL could also be
11 seen in the "From" field which displayed, "John Philip Sousa IV (The 2016 Committee)
12 john@2016committee.org."

13 *September 16, 2015 Email Receipt.* This email did not include a disclaimer, but it
14 otherwise provided some of the required information.²⁶ Sousa IV signed as "2016 Committee
15 Chairman," thereby indicating that the Committee was responsible for the email, and the
16 Committee's name and address were listed at the bottom. Although there was no statement that
17 the Committee paid for the communication or that it was not authorized by any candidate or
18 candidate's committee, it is likely that recipients would have nonetheless understood this to have

²⁵ Compl., Ex. at 1-5. There is no information regarding the size of the Committee's email list. However, because there were nearly 4,500 individuals who made an itemized contribution during the 2016 election cycle prior to this email, it is plausible that there were at least 500 people on the list. See The 2016 Committee 2015 Year-End Rpt. (Jan. 31, 2016); The 2016 Committee Amended 2015 Mid-Year Rpt. (Feb. 26, 2016).

²⁶ Compl., Ex. 6-8. There is no information regarding the number of contributors who received a similar email receipt. However, because the Committee reported over 11,000 itemized contributions during the 2016 election cycle prior to this receipt, it is plausible there were at least 500 such recipients. See The 2016 Committee 2015 Year-End Rpt. (Jan. 31, 2016); The 2016 Committee Amended 2015 Mid-Year Rpt. (Feb. 26, 2016).

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1 been the case. Because the email was sent in response to a contribution, recipients would have
2 likely visited the Committee's website or received emails from the Committee. As described
3 above, the website included adequate disclaimers and information distinguishing the Committee
4 from Carson's official presidential campaign, and some of the attached emails contained at least
5 partially adequate disclaimers stating that the Committee was not authorized.

6 *November 16, 2015 Email.* At the top of an email sent by Carson America using the
7 Committee's email list on a rental basis, appeared a short message written by Sousa IV on behalf
8 of the Committee.²⁷ This introductory greeting — "I'm forwarding you an urgent message from
9 Ben Carson that I thought would be of interest to you." — did not include a disclaimer, but there
10 was a disclaimer at the bottom referring to the portion of the email attributed to Carson
11 America.²⁸ Without any other information, a recipient might have reasonably assumed that
12 Carson's committee was responsible for the entire email, and that Carson or someone working
13 for his committee gave Sousa IV the message.

14 Although the email's disclaimer identified Carson America as the sender, while including
15 a preamble by Sousa IV on behalf of the Committee, the likelihood of any confusion was
16 minimal. The short preamble simply explained why an email from Carson was being transmitted
17 through the Committee's email list. Moreover, there was no solicitation on behalf of the
18 Committee. Furthermore, because the email was sent to the Committee's email list, recipients

²⁷ Sousa IV's name and the URL of the Committee's website appear in the "From" field. As stated above, the Respondents assert that it was necessary for the email to "contain transmittal information from the list owners . . . to prevent emails from being reported as spam." Committee & Sousa IV Resp. at 3. It appears this is a common practice. See First Gen. Counsel's Rpt. at 4-6, MUR 6775 (Ready for Hillary PAC) (explaining how a list brokerage firm generally "include[d] the owner of the list in the 'from' line for security purposes, to protect against unapproved usage of the list, and for legal compliance with federal SPAM opt-out laws").

²⁸ See Compl., Ex. at Part 1.

1 would have likely received preceding and subsequent emails with disclaimers and other relevant
2 background information about the Committee, distinguishing it from Carson America.

3 In conclusion, the Committee's website included an adequate disclaimer, and the
4 Committee's emails included partially adequate disclaimers or were missing disclaimers.
5 However, with respect to the emails lacking full disclaimers, there was sufficient information for
6 recipients to understand that the Committee paid for the emails and was not authorized by any
7 candidate or candidate's committee. The Commission has dismissed similar allegations where
8 communications were unlikely to mislead, based on the contents of the communications at issue
9 or the contents in other communications sent to the same recipients.²⁹ Therefore, we recommend
10 that the Commission exercise its prosecutorial discretion and dismiss the allegation that the
11 Committee violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a), pursuant to *Heckler v.*
12 *Chaney*, 470 U.S. 821 (1985).

13 **B. Fraudulent Misrepresentation**

14 The Act provides that "[n]o person shall fraudulently misrepresent the person as
15 speaking, writing, or otherwise acting for or on behalf of any candidate or employee or agent
16 thereof for the purpose of soliciting contributions or donations."³⁰ Further, "[n]o person shall . . .

²⁹ See, e.g., MUR 6835 (Lesli Good for Congress) (dismissing allegation that a committee's mailer failed to include a disclaimer where the committee included proper disclaimers on other mailers, and the mailer at issue contained some identifying information); MUR 6814 (Erin Bilbray for Congress, *et al.*) (dismissing allegation that committee failed to include adequate disclaimers in an email where the correspondence was "unlikely to have misled the public recipients due to the identifying information included in the email"); MURs 6799 & 6842 (Frank Scaturro for Congress, *et al.*) (same); MUR 6438 (Arthur Robinson for Congress) (same).

³⁰ 52 U.S.C. § 30124(b)(1); 11 C.F.R. § 110.16(b)(1). The Commission has identified various types of conduct that may support a reason to believe finding. E.g., Factual & Legal Analysis ("F&LA") at 5-6, MUR 6531 (Obama-Biden 2012) (operating under candidate's name, and placing candidate's official logo on website and merchandise); F&LA at 2-4, MUR 5495 (johnfkerry-2004.com) (using a false disclaimer, and making statements that appeared to have been made on behalf of the candidate); F&LA at 5, MUR 5472 (Republican Victory Committee) (making statements that appear to imply that contributions would be directed to the party committee). Each of these examples evinces some kind of intent on the part of the Respondent. Also relevant is evidence

1 willfully and knowingly participate in or conspire to participate in any plan, scheme or design to
2 violate" this provision.³¹ The Act requires that the violator have the intent to deceive, but does
3 not require proof of the common law fraud elements of justifiable reliance and damages.³²
4 Additionally, "[e]ven absent an express misrepresentation, a scheme devised with the intent to
5 defraud is deemed a fraud under the Act and the Commission's regulations if it was reasonably
6 calculated to deceive persons of ordinary prudence and comprehension."³³

7 There is nothing in the available information tending to suggest that the Respondents
8 misrepresented themselves (or intended to misrepresent themselves) as acting on behalf of
9 Carson or his authorized committee. First, the "Who We Are" section of Committee's website
10 clearly explained that the Committee is the successor to the National Draft Ben Carson for
11 President Committee, and that, in order to comply with Commission regulations, the draft
12 committee could no longer use Carson's name when he became a candidate.³⁴ Second, the

showing that contributors have in fact been misled by the communications at issue. See Gen. Counsel's Brief at 17, MUR 5951 (Californians for Change).

³¹ 52 U.S.C. § 30124(b)(2); *see also* 11 C.F.R. § 110.16(b)(2).

³² First Gen. Counsel's Rpt. at 4, MUR 6868 (Vincent Harris); F&LA at 4, MUR 5472 (Republican Victory Committee, Inc., *et al.*); *see* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Person Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002) (Explanation & Justification) (citing *Neder v. United States*, 527 U.S. 1, 24-25 (1999)).

³³ F&LA at 4, MUR 6531 (Obama-Biden 2012); *see United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004); *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010) (finding that defendants knowingly and willfully violated 2 U.S.C. § 441h(b) (now 52 U.S.C. § 30124(b))); *see also* F&LA at 9, MUR 5951 (Californians for Change).

³⁴ We note the Committee's use of the candidate's name in its slogan and logo ("Win Ben Win!"), which features prominently in each of the communications at issue. However, we make no recommendation here as to the Committee's use of the candidate's name under 11 C.F.R. § 102.14. There is no specific allegation in the Complaint with respect to the naming regulation and, further, the candidate's name was not used in a context that the Commission has previously recognized as within the scope of that regulation. *See, e.g.*, Advisory Op. 2015-04 (Collective Actions PAC) (name of social media account); Advisory Op. 1995-09 (NewtWatch) (name of website). Moreover, in light of current litigation involving the constitutionality of the Commission's regulation, and the likelihood that this question will not be resolved in the near future, we see no reason to unnecessarily delay resolution of this matter, especially given the Respondent's documented efforts to distinguish itself from the candidate's authorized committee. Indeed, it appears that the term "Win Ben Win" is a remnant of the Committee's

1 Committee's emails and the screenshot of the Committee's website do not contain any
2 statements purportedly made by or on behalf of the candidate.³⁵ Third, the Committee's
3 communications, other than the September 16, 2015, email receipt, specifically stated that the
4 Committee was not authorized by any candidate or candidate's committee.³⁶ Fourth, the
5 communications clearly identified the Committee as distinct from the candidate and his official
6 campaign. One email states that the Committee's "primary focus" was to provide a biography of
7 Carson written by Sousa IV to prospective Republican voters.³⁷ Although Complainant
8 maintains that he was personally misled into believing that the Respondents were acting on
9 behalf of Carson or his authorized committee, the available information does not support a
10 reasonable inference that Respondents intended to cause such confusion.

11 Therefore, we recommend that the Commission find no reason to believe that the
12 Committee, Sousa IV, or Robinson violated 52 U.S.C. § 30124(b)(2) and 11 C.F.R.

original existence as a draft committee; which employed the slogan "Run Ben Run." THE 2016 COMMITTEE –
BALLOTPEdia, https://ballotpedia.org/The_2016_Committee (last visited Jan. 10, 2017).

³⁵ As noted above, Sousa IV wrote a preamble on behalf of the Committee that appeared at the top of the November 16, 2015 email paid for by Carson's authorized committee, using the Committee's email list on a rental basis. It appears this preamble was intended to explain why members of the Committee's email list were receiving a message from Carson's committee, and not an attempt to misrepresent that Sousa IV or the Committee were working for Carson or his committee. And, importantly, the preamble did not solicit contributions on behalf of the Committee.

³⁶ See F&LA at 10, MUR 6641 (CAPE PAC) (explaining that an adequate disclaimer "can defeat an inference that a respondent maintained the requisite intent to deceive for purposes of a [52 U.S.C. § 30124] violation"). The fact that some of the disclaimers were apparently less than adequate does not undermine their value as evidence to show a lack of intent with respect to a fraudulent misrepresentation claim. F&LA at 11, MUR 6633 (Republican Majority Campaign PAC) (concluding that inadequate disclaimers may still indicate that the respondent committee did not fraudulently misrepresent itself as acting on behalf of a candidate); *but see*

F&LA at 4 n.2, MUR 5472 (Jody Novacek).

³⁷ Compl., Ex. at 3.

1 § 110.16(b)(2) by fraudulently misrepresenting themselves as acting on behalf of a candidate or
2 candidate's committee for the purpose of soliciting contributions.³⁸

3 **IV. RECOMMENDATIONS**

- 4 1. Dismiss the allegation that The 2016 Committee and Robert H. Frank in his
5 official capacity as treasurer violated 52 U.S.C. § 30120(a) and 11 C.F.R.
6 § 110.11(a);
- 7 2. Find no reason to believe that The 2016 Committee and Robert H. Frank in his
8 official capacity as treasurer, John Philip Sousa IV, and Ron Robinson violated
9 52 U.S.C. § 30124(b)(2) and 11 C.F.R. § 110.16(b)(2);
- 10 3. Approve the attached Factual and Legal Analysis;
- 11 4. Approve the appropriate letters; and

³⁸ The Complaint does not allege that the Respondents were employees or agents of a candidate or acted in a manner which was damaging to the candidate — required elements of 52 U.S.C. § 30124(a), a separate but related provision of the Act prohibiting fraudulent misrepresentation. *See* F&LA at 3-4; MUR 6673 (David Lee for Supervisor) (finding no reason to believe where the respondents were not agents or employees of a candidate and did not make statements in any way damaging to the allegedly represented candidate). We therefore make no recommendation with respect to that provision.

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5. Close the file.

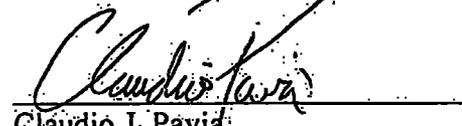
Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Acting Associate General Counsel

Date: 1/24/17


Stephen Gura
Deputy Associate General Counsel


Mark Shonkwiler
Assistant General Counsel


Claudio J. Pavia
Attorney

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